United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2044

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ZACHARY MORGAN,

Appellant,

-against-

EDWIN J. LaVALLEE, Warden of Clinton State Prison, Officers of Unit 14 et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

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Statement

This is an appeal from an order dated April 4, 1974 of the United States District Court for the Northern District of New York (Foley, J.) dismissing a complaint initiated under the Civil Rights Act.

Question Presented

Did the complaint set forth facts sufficient for showing the violation of any First Amendment right?

Prior Proceedings

The complaint alleged that on February 8, 1974 appellant was transferred from Attica State Prison to Clinton State Prison; that upon his arrival at Clinton he was placed in segregation because of his political beliefs; that on February 19, 1974 he received from the Clinton Correspondence Department a memo that directed him to advise the people on his correspondence list not to send him stamps; and that on or about February 25, 1974 he received from the Clinton Media Review Committee, a memo stating: "Institution Media Committee has adjudged your Midnight Special -- 1/74 Vol. 4, No. 1 in violation of Department Guideline # 6."* Appellant claimed that appellees did not attempt to familiarize him with the guideline. The court noted that appellant did not show that he made an effort to obtain a copy of the guideline which was readily available from the facility or its law library.

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* Guideline 6 contained in Administrative Bulletin No. 60 appears in Appellant's Appendix, p. 16 as follows: "Inmates will not be prohibited from subscribing to newspapers, magazines and periodicals, but shall be informed that individaul issues will be withheld if information contained therein is confirmed to be in violation of the guidelines set forth in this Bulletin. Articles will not be cut out or otherwise removed from any publication."

* (footnote continued)
The aforementioned guidelines appear in Appellant's Appendix pp. 14-15 as follows:

> "1. In general, the materials should be acceptable for regular mailing in the United States.
>
> "2. In general, publications which are utterly without redeeming social value, or which clearly depict acts involving necrophilia, masochism, sadism, bestiality, or unnatural preoccupation with excrement, are not acceptable. Otherwise, literature dealing with the subject of sex is to be considered appropriate.
>
> "3. The publication should not defame, villify or incite hatred towards persons because of their race, religion, creed or national origin.
>
> "4. The publication should not advocate the violant overthrow of the existing form of government of the United States or of this State. (See Penal Law § 240.15).
>
> "5. The publication should not advocate lawlessness, violence, anarchy or rebellion against government authority or portray such conduct as a commendable activity.
>
> "6. The publication should not incite disobedience towards law enforcement officers or prison personnel.
>
> "7. The publication should not depict the use or manufacture of firearms, explosives and other weapons.
>
> "8. The publication should not be of such a nature as to depict, describe or teach methods and procedures for the acquisition of certain physicial manupulations and skills which expertise will, in the opinion of Department authorities, constitute a threat to the safety, welfare and health of other inmates and employees."

The District Judge did not require the appellees to file an answer to the complaint and he dismissed it sua sponte for failure to show a violation of any constitutional right.

ARGUMENT

THE COMPLAINT FAILED TO SET FORTH FACTS SUFFICIENT FOR SHOWING THE VIOLATION OF ANY FIRST AMENDMENT RIGHT.

A. Appellant contends that appellees' refusal to let him receive the Midnight Special violated his First Amendment rights. It appears from the complaint that information contained in the issue was confirmed to be in violation of the Department's Guidelines. However as appellant notes, the January 1974 issue of the Midnight Special was not before the court. Indeed it is impossible to tell from the record what information contained in the issue violated the guidelines and which guidelines it violated. Federal jurisdiction cannot be invoked on the basis of the abstract question arising here. See e.g. Lecci v. Cahn, 493 F. 2d 826, 829 (2d Cir. 1974)("The district court here, in our view, was rendering a purely advisory opinion which of course it is powerless to do.") In re Michaelson, 511 F. 2d 882, 893 (9th Cir. 1975); Danielson v. International Bro. of Elec. Wkrs., L.U. 501, 509 F. 2d 1371, 1374 (2d Cir. 1975); Hericks v. Hogan, 502 F. 2d 795, 796 (6th Cir. 1974).

Appellant did not challenge the constitutionality of any of the guidelines. In fact he acknowledged that he was not familiar with them. It must be assumed that correction officials followed the guidelines in refusing to let him receive the issue in question, and that these guidelines are constitutional. Cf. Procunier v. Martinez, 416 U.S. 396, 413-414 (1974)(a practice which furthers one or more of the substantial government interests of security, order and rehabilitation and which is not unnecessarily broad does not violate First Amendment freedoms.)

B. Appellant contends on this appeal that withholding postage stamps from him is a form of censorship. The complaint however did not allege that appellees withheld postage stamps from him. The allegation was that the Correspondence Department directed him to advise people on his correspondence list not to send him stamps. Indeed as appellant notes there is a regulation which provides that the facility will provide an inmate with postage for one letter a week. (App. Br. 8; 19). There was no claim in the complaint that the facility has not provided him with the one free letter per week as required by the regulation. Moreover, the allegation as to receing a memo directing him to advise correspondents not to send stamps is on its face incredible. There is no prohibition against sending an inmate stamps. The practice at Clinton is to credit the stamps received to the inmate's account. There was no alleged memo annexed to the

complaint, nor did he assert that he complied with the alleged direction contained in the memo or that it was enforced.

C. Appellant claimed in the complaint that he was placed in segregation because of his political beliefs. The assertion was conclusory and unsupported by an allegation of facts which could show a violation of First Amendment rights. See Powell v. Workmen's Compensation Board of State of New York, 327 F. 2d 131, 137 (2d Cir. 1964). Apparently his confinement reflects incidents of violation of rules or regulations governing behavior or refusal to comply with instructions given by an official acting within the scope of his duties.

Insofar as he now contends that a "liberal reading" of the complaint indicates that he was placed in Unit 14 [which is a Special Housing Unit] without a hearing, this is a new claim which was not set forth in the complant. Appellate consideration of the issue is therefore foreclosed. Terkildson v. Waters, 481 F. 2d 201, 204-205, 2d Cir. 1973); First National Bank of Cincinnati v. Pepper, 454 F. 2d 626, 636 (2d Cir. 1972); Hoffman v. Halden, 268 F. 2d 280, 288 n. 1 (9th Cir. 1959); Belts v. Board of Education of City of Chicago, 466 F. 2d 629, 632 (7th Cir. 1959).

Assuming however that this Court finds that the complaint does set forth facts sufficient for invoking federal jurisdiction or for stating a claim upon which relief may be granted, the case should not be remanded to the District Court for trial as appellant contends, but for the purpose of giving the appellees the opportunity (heretofore foreclosed by the District Court's summary decision) of responding to the complaint by way of answer and motion for summary judgment upon supporting affidavits. On such a motion it could then be determined whether material issues of fact are raised requiring a trial. Zachary Morgan v. Ernest Montanye, ____ F. 2d ____ (2d Cir. Decided May 6, 1975), Slip opinion no. 614 at page 3469.

CONCLUSION

THE ORDER SHOULD IN ALL RESPECTS BE AFFIRMED.

Dated: New York, New York
June 17, 1975

Respectfully submitted,

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Attorney for Appellees

SAMUEL A. HIRSHOWITZ
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Assistant Attorney General
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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MAGDALINE SWEENEY, being duly sworn, deposes and says thats he is employed in the office of the Attorney General of the State of New York, attorney for Appellee herein. On the 18th day of June, 1975, she served the annexed upon the following named person :

DONALD GRAJALES, ESQ.
Project Director
BRONX LEGAL SERVICES, CORP. C.
579 Courtlandt Avenue
Bronx, New York 10451

Attorney in the within entitled appeal by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Magdaline Sweeney

Sworn to before me this
18th day of June, 1975

Burton Herman
Assistant Attorney General
of the State of New York